IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 117 of 1988

IBRAHIM

V/S

SHAKIL

Mr. JAI KISHAN BHAIYA and Mr.NS RAJPUROHIT, for the appellant / petitioner

MR. G.R.BARI FOR THE RESPONDENT

Date of Order : 4.8.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

This appeal has been filed by the plaintiff. The facts of the case are, that on 10.9.79, the plaintiff filed a suit for perpetual injunction against the respondents, alleging inter-alia, that the plaintiff's house described in para-1 of the plaint is situated in Dungerpur, and towards the west of that house is a lane, and Naveri, which is of the ownership and possession of the plaintiff, and thereafter, towards the further west is the shop of Sajjad Hussain Bohra, and the house of the defendants. The measurements of the lane have been given. Then it is alleged, that in this lane, the plaintiff has constructed two latrine, and doors of the two rooms were also opened, for passage. Then the doors and windows of the first floor also opened. Then projecting covers of the window (छज्जे) also exist, which provide light and air, and that he (he

alongwith his predecessor in interest) has been using the lane for passage for the last 100 years. It is also pleaded, that the rain water of the plaintiff's roof, including the water from the tin shed also fall, inasmuch as, four spout are there for discharge of rain water, and spouts for discharge of regular water also exist, which water flows towards the north in the Municipal drain. The plaintiff's case thereafter is, that earlier, the defendant's house was a single storey house, with tiled roof, having the height of 8 ft, and the water of eaves used to fall in the lane, and beyond this, there were no other apertures. However, about 1 and a half year ago, since the defendant Shakil had gone to Kuwait, in his absence, defendant Bano demolished the existing house, and reconstructed, in which process, the wall "ब" "स" has been raised to the height of 22 ft, and the two storied house has been constructed Pakka, and has left three openings on the roof on 30.8.79, intending to discharge rain water from that roof, through spout, or pipe etc. According to the plaintiff, as the defendant had raised the height from which the water used to drop being the height of 8 ft, and by increasing it to 22 ft, that right has been extinguished. It is also pleaded, that by opening the windows or other apertures in the wall "ब" "स" and keeping the spout, the right of privacy of the plaintiff would be infringed, and he would not be able to use the lane (Naveri) independently, as usual. Inter-alia with these

averments, a decree has been claimed for perpetual injunction, restraining the defendants from opening any door, window, ventilator, or keeping spouts etc. in the wall looking towards the lane "क ख ग घ", and in case, during pendency of the suit, any pipe etc. is installed in the openings, they be removed. The other relief claimed is, that the opening that had been kept for passage of water should be closed.

Written statement had been filed by the defendant, contending interalia, that the lane is not exclusively of the plaintiff, rather defendant has also right therein, and that the latrine, bathroom, constructed recently by the plaintiff, are unauthorised. It was contended that in the lane, apart from the rights of the plaintiff, the defendant had a spout in the ground floor, and a door also, but in view of dirt and filth in the lane, the door was closed, while the spout continues, and the rain water of the roof also falls therein, thus the lane is joint. Then, it was pleaded that tiled roof has been removed and Pukka Chhat has been constructed, water thereof has not been discharged in the lane. However, the defendant is entitled to keep doors and windows, for light and air. Replying para-8 it was pleaded, that the defendant has a right to discharge water in the lane, but after new construction, no rain water is being discharged towards the lane. Interalia with these averments it was prayed, that the suit be dismissed.

The learned trial court framed three issues. The first issue being, as to whether the western land "क ख ग घ" is of the exclusive ownership and possession of the plaintiff, while issue no.2 is, as to whether the plaintiff is entitled to have the openings of the defendant, kept towards the lane, closed. The third issue is regarding relief.

During trial plaintiff examined eight witnesses, while the defendant examined three. The plaintiff had produced various documents, also including sale deed of the plaintiff, judgment of the Court of Civil Judge Dungarpur dt. 14.1.1964, passed in Civil Suit No. 164 of 1962, Ibrahim Vs. Manaklal (Ex. 14), site plan in that suit, being Ex. 15 etc. However, the defendant also produced the sale deed dt. 14.7.1969. The learned trial court decided issue no.1 against the plaintiff, and came to the conclusion, that the plaintiff has failed to establish himself to be owner, and to be in exclusive possession, or use of the lane, to the exclusion of all others. Then, deciding issue no.2, taking into consideration the provisions of Section 22, 23, 24, 32, 37, 38, 39, 40, 44, 45, 46, and 47 of the Easement Act also, came to the conclusion, that the defendant has a right to discharge water, and the plaintiff is not entitled to have the openings closed. These findings sufficed to dismiss the suit, however the learned trial court, looking to the

convenience of the parties, directed the defendant to discharge water through pipe, which may open at a height of nine inches from the ground. In appeal these findings and decree have been affirmed.

Arguing the appeal, it was contended, that the learned courts below has not considered the earlier judgment Ex. 14, the Site Plan Ex. 15 and 16, in right perspective, as therein it had clearly been held, that the plaintiff is the owner of the lane. The other submission made is, that the report submitted by the Commissioner Brij Mohan, has not been considered, and has not properly been seen, which vitiates the findings, and since the plaintiff is the owner of the lane, defendant cannot discharge water. The alternative submission made is, that in any case, earlier the defendant was discharging water from the height of 8 ft., and that by also eavesdrops, as against which, the height has been raised to 22 ft., and instead of eavesdrops, the water is sought to be discharged by spout, which increases the burden of easement, and results into extension of easement, and therefore, also the suit was required to be decreed.

The matter was heard on 28.7.2006, on that day nobody appeared for the respondent, and the dictation of judgment was commenced that day, but could not be completed, then the matter was taken up today. Today the

learned counsel for the appellant requested to make some more submissions, which request was allowed, and accordingly the learned placed reliance on the provisions of section 43 of the Indian Easements Act, and also relied upon a judgment of this court in Bakhtawarmal v/s Brijmohan, reported in 1960 R.L.W. 318. while the learned counsel for the respondent did not make any submission.

I have considered the submissions, and have gone through the record.

This appeal was admitted on 16.7.1991, by framing three substantial questions of law, which read as under:-

> 1. Whether the easementory right of the defendants does not stand extinguish despite change in the dominant heritage?
>
> 2. Whether the decree of placing of pipes by the defendants is not entirely beyond the scope of the suit and contrary to the pleadings of the defendants?
>
> 3. Whether the learned appellate court has not illegally discarded the Commissioner's report from consideration?

At the outset it may be observed, that regarding question no. 2, no submissions were made by the learned counsel, so as to persuade me to set aside the direction of the learned courts below, directing the respondent to

discharge water by placing pipes. It is a different story, that setting aside the direction would result into allowing the defendant to discharge the water from the height of 22 ft., which is likely to cause inconvenience to the plaintiff. Be that as it may. Since no submissions have been made, I need not dilate on this question.

In this background I now proceed to examine the questions, and the submissions made by the learned counsel for the appellant.

So far as the question of plaintiff being the exclusive owner of the lane is concerned, it is a different story, that no substantial question of law has been framed on this aspect of the matter, even otherwise, a bare reading of the statement of the plaintiff P.W.1, in conjunction with the statement of D.W. 2 and D.W.3, the sellers of the property of the plaintiff, and the defendant respectively, leaves no manner of doubt, that the lane does not belong exclusively to the plaintiff, but was a common amenity, to be used by the two neighbours. In addition I may observe, that the lane is not described in the documents, or in the statements as lane, but is described as नवेरी literally means a lane, where नेव i.e. the eavesdrops, fall. Obviously since admittedly earlier the house of the plaintiff, and defendant, both were Kellu Posh, and that eavesdrops were to fall in this lane, and lane was kept as

नवेरी. Thereafter, admittedly the plaintiff has constructed Pucka house, and is discharging rain water from spouts, instead of eaves, to which no objection was raised by the defendant, obviously as a good neighbour, and now, when the defendant has been able to construct a Pucka house, on account of financial convenience, the plaintiff is getting annoyed, and the heart burning is sought to be ventilated by way of present suit, claiming himself to be exclusive owner. In the entire statement, given in the Court as P.W.1, there is not a word on the side of the plaintiff to depose the lane to be his exclusive property, or having been purchased as a part of the house, while the two sellers, examined as D.W. 2 and D.W. 3, have clearly deposed otherwise, and their testimony has not been shaken in a satisfactory manner. So far previous judgment Ex. 14 and the document of that suit are concerned, admittedly the defendant was not a party to that litigation, and on the face of language of Section 11 C.P.C., that judgment cannot operate res-judicata against the defendant, that judgment has rightly been held to be of no assistance to the plaintiff, by both the courts below. I am at one with the learned courts below on this finding as well. In that view of the matter, this contention of the learned counsel cannot be accepted.

Taking the substantial question no. 3 first, admittedly the two learned courts below have not taken into

consideration the Commissioner's report, and the learned lower Appellate Court, in para-7 has observed, that for enabling the Court to see the report of the Commissioner, the report was required to be tendered in evidence, and the Commissioner should have been produced in the witness box, that having not been done, the Commissioner's report cannot be looked into. During the course of arguments learned counsel could not substantiate his stand, about the Commissioner's report to be required to be read into evidence without being tendered in evidence, and without producing the Commissioner in the witness box, therefore, the question is required to be answered against the appellant, is accordingly answered against the appellant.

Then, coming to question no.1, at the out set it may be observed, that the whole contention is completely misplaced. The contention proceeds on the basis, that the lane belonged to the plaintiff, and the defendant had a right to discharge eavesdrops thereon, the burden of easement has been increased by raising the height, and setting up spouts instead of eaves. A look at Section 4 of the Easement Act shows, that it defines easement, as a right, which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something, being done, in or upon, or in respect of, certain other land, "**not his own**". The

relevant words in this definition are "**not his own**". Had the plaintiff been able to establish, that the lane belongs exclusively to the plaintiff, and is in his possession, then obviously that would not have been own lane of the defendant, and the right to discharge rain water, might have fallen within the definition of easement, but when the lane is found to be common, obviously not divided longitudinally half to half, and therefore, the defendant is also as full owner of the lane as the plaintiff also claims to be. In that view of the matter, the discharge of water, and opening of the doors and windows, cannot be said to be a right of easement, but is in exercise of right of ownership, over the common lane, with respect to which, none of the constraints of Section 41, 42, 43, 44, 45, 46, 47, 48 etc. could at all be argued to be attracted. So far the provisions of Section 22 etc. of the Easement Act are concerned, they also are of no consequence for the simple reason, that the user of the lane by the defendant, in discharging water, and by claiming right to open doors and windows, as above, is in exercise of right of common ownership over the common lane. Therefore, the question no.1 is also required to be, and is, answered against the appellant, and it is held, that there is no dominant heritage or servient heritage, so as to attract the considerations of extinction of right of easement, by change in the dominant heritage, or increase of burden. Obviously in view of the above the judgment in

Bakhtawarmal's case is of no assistance to the appellant.

No other question has been argued.

The net result is that the appeal has no force, and is dismissed. The parties shall bear their own costs.

(N P GUPTA),J.

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